INDEX

	Page
Interest of Amicus Curiae	1
Respondent's Position	2
Statement	2
Congressional Action	2
Jurisdiction and Standing	5
Conclusion	7

CITATIONS

Constitution, Statutes and Regulations:

United States Constitution

Article 1, Section 5	7
Article 1, Section 6	2, 6, 7
Article 1, Section 8	3

Statutes:

5 USC 2105(d)	5
10 USC 351	4
10 USC 372	4
28 USC 2282	5
36 USC 221	1
36 USC 223	1
36 USC 224	1

Miscellaneous:

1 Hinds, Precedents of the House of Representatives (1907)	7
6 Cannon, Precedents of the House of Representatives (1936)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE ON THE MERITS

INTEREST OF AMICUS CURIAE

The Reserve Officers Association of the United States, a federally chartered corporation (64 Stat. 313, 36 USC 221 (1950)) is committed by the terms of its charter to the support of a military policy for the United States which will provide adequate national security, and to promote the development and execution thereof (64 Stat. 313, 36 USC 223 (1950)). The Association (which has over 70,000 members) is vested with the right to sue and be sued (36 USC 224). The Association's aim is to keep America strong in a perilous world. As such, any attack which would lessen ROA's ability to serve the nation is a matter to be contested. Both your Petitioner and Respondent have consented to the filing of this Brief, Amicus Curiae.

RESPONDENT'S POSITION

Respondent, in his Brief accompanying his complaint to the District Court for the District of Columbia, cites a possible conflict of interest situation, and asserts a conviction that our Constitution as put together by the Framers thereof, laid down rules which create possible inconsistent obligations on the part of a member of Congress if he holds a Reserve Commission. In addition, the Respondent infers the Framers did not intend to place members of the legislative branch of the government in a position to determine (exclusively and without court intervention) whether or not such a conflict exists.

STATEMENT

While it is quite true the Framers' end product (U.S. Const., Art. I § 6) would seem to indicate some thought along the lines set out in the preceding paragraph, the fact is there was considerable discussion on this point which resulted in a compromise Article which, in its first section, refers to a "civil" office and in its second section to "any" office. Assuming they meant to bar a legislator from holding any "office" in another branch of the government, they could only have arrived at such a position based on what was extant at the time (as regards "military" offices).

The Constitution as finally arrived at in 1787 provided in Article I, Section 8 for the organization of a militia, and reserved to the States the appointment of officers. The second Amendment to the Constitution provided that the right to bear arms by the people who were to constitute the to-be organized militia would not be infringed. It follows that the Framers were thinking in terms of various State militia in contrast with today's federal reserve forces. The Congress was

given the power to raise and support armies but the reserves were to be composed of militiamen drawn from the various State populations for the purpose of suppressing insurrections and repelling invasions (U.S. Const., Art. I, § 8). The President was designated as Commander in Chief of the Army and Navy of the United States but no provision was made for the establishment of a Federal Army and Naval Reserve. It is clear that, so far as the Framers were concerned, any such reserve if contemplated at all as such, would be composed of the militia of the several states. As pointed out by the lower court, the Framers were concerned about the availability of members of the legislative body for military service on the grounds that experienced soldiers, (officers), which many of them were or had been, could very well be the best men in the event of insurrection or invasion and therefore ought not, simply because they were members of the Congress, be foreclosed from military service. (This included a great number of those concerned, who had served in the Revolutionary War). These concerns were not so much for the individual as they were for the good of the new country.

Because of these objections the originally proposed clause quoted by the Court below as follows:

> "The members of each House shall be ineligible to and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards"

was changed in a compromise move, to read:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any

> civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office."

Since the compromise wording was apparently satisfactory to the majority of the Framers including some of those who had raised the objections to the proposed language, the acceptable wording became part of our Constitution.

We believe it fair to say that the militia as it existed or was about to exist in 1787 is not comparable in any fashion to today's reserve forces. The Officers' Reserve Corps did not come into being until 1916 (National Defense Act, June 3, 1916, § 37, 39 Stat. 776, 10 USC 351 (1916)). Thus we see that the Federal Reserve Forces are creatures of Congress, and are neither provided for nor contemplated by the Constitution.

CONGRESSIONAL ACTION

The Congress of the United States, in its legislative capacity, declared specifically, in the National Defense Act (National Defense Act of June 4, 1920, as amended by the act of July 11, 1930, 46 Stat. 154, (old) 10 USC 372; c.f. Sec. 1361 (p. 857), Military Laws of United States (Army) Ann. 1949, 9th ed.)), that

> "Members of the Officers' Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, oath, commissions, or status as such, or any duties or function performed or pay and allowances received as such, be held or deemed to be officers or employees of the United States or persons holding any office of trust or profit or discharging any official function under

or in connection with any department of the Government of the United States."

In addition, the Court's attention is drawn to 80 Stat. 409, 5 USC 2105(d) (1966). Once again, Congress has by definition, held that reservists are not office holders. The section is quoted as follows:

> "(d) A reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

Thus we see that the Congress, presumably within the framework of the whole law including the Constitution, has very carefully eliminated a nonactive duty officer reservist from being considered an "office holder".

JURISDICTION AND STANDING

The District Court, in its order, granting (in part) Respondent's motion for summary judgment, has, in effect, determined that the portion of the National Defense Act as amneded by the act of July 11, 1930, quoted above), is unconstitutional. Although no injunctive relief was granted, the complaint asked for such relief. Since the complaint in effect asked that an injuntion be issued restraining the operation of a statute as being repugnant to the Constitution, the application therefore should have been heard by a three judge court under the provisions of title 28, section 2282, U.S. Code.[1]

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[1] "§ 2282. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress

In its final comment on "Standing", the District Court stated: "It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendant's action, then, as a practical matter, no one can."[2] It is submitted that no one can. Article I, Section 6 of the Constitution provides that no federal "office" holder may be a member of Congress. Article I, Section 5 reserves to the Congress the power to pass upon the qualifications of its members. By giving equal weight to both sections, we arrive at the conclusion that the Congress *must* consider the holding of another Federal office as one of the disqualifications for membership.

As shown above, Congress has already determined that reserve officers as a class, do not hold a federal "office", while not on extended active duty. This is in accord with the Constitutional mandate to Congress to pass upon qualifications of its members.

It seems anomalous to intimate that Congress has passed legislation which will diminish its own power, and that this situation can only be corrected by the courts. To hold thus would be indeed an attack upon the maturity and good intentions of the Congress, not to mention the integrity of the members of one of our branches of government. In this particular situation, Congress, if an evil exists (and the Congress would be the first to feel this evil), can undo what they have

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for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 6 2Stat. 968."

[2] U.S. Dist. Ct., D.C. Circuit, Civil Action No. 1429-70.

created, by appropriate legislation. In addition, the Constitutional power of the Congress to pass on the qualifications of their own members can be invoked (U.S. Const., Art. I, § 5; c.f. 1 Hinds, Precedents of the House of Representatives, 592-603, 612, 620-632 (1907); 6 Cannon, Precedents of the House of Representatives, 67, 69 (1936)).

CONCLUSION

The Supreme Court should reverse the holdings below, and declare that the matter is properly one for Congressional action, if action is indicated. The Constitutional powers of Congress to legislate, and to pass on the qualifications of its own members should be the only controlling factors in this case. In the event this honorable Court should decide that the matter in controversy is properly for the Court's determination, then the decision should be that the holding of a reserve commission, while not on extended active duty, is not the holding of an "office" under Article I, Section 6 of the United States Constitution.

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